UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 566

Case No. 602: AHMED

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Ioan Voicu;

Whereas, on 4 June 1991, Anis Uddin Ahmed, a former staff member of the United Nations, filed an application containing the following pleas:

"Section II. PLEAS

(...)

(a) The Applicant is requesting the Tribunal to order the production of the following documents:

(i) Copy of the Vacancy Announcement 89-A-OPB-347-NY.

(ii) Statements of qualifications and experience of the candidates short listed by the APB [Appointment and Promotion Board] for the post of Chief, MAS [Management Advisory Service].

(iii) Fact-sheet of the Applicant.

(iv) Copy of a letter from [the Assistant Secretary-General, Office of Human Resources Management] to [the Acting Under-Secretary-General, Administration and Management], which is referred to in the letter attached (...).

(b) The Applicant is contesting the following decisions:

(i) The decision of the Secretary-General to fill the vacancy under the vacancy management procedure, instead of under the procedure laid down in staff rule 104.14(f)(iii) which was not yet superseded.

(ii) The decision by the APB not to prepare a short list of the 'best qualified' candidate(s) for the post, as required under the VMS [Vacancy Management and Staff Redeployment system] procedure as laid down in ST/AI/338/Add.5, para. 10 (...).

(iii) The decision of the APB not to recognize the Applicant as the 'best qualified' of all candidates, which was an objective fact.

(iv) The decision of the APB not to take into account the implications of the phrase 'other things being equal' in (...). Had it done so the invoking of the secondary criterion, that is to say, whether a candidate's post was slated for abolition, would not be necessary.

(v) The decision by the Secretary-General (in OHRM [Office of Human Resources Management]) not to point out to the APB the violation of the required procedure, which was his duty.

(vi) Consequent decision by the Secretary-General to appoint Mr. J. Klee instead of the Applicant as the Chief, MAS (...).

(vii) The decision of the Joint Appeals Board [JAB] or its failure to consider the issues stated in my observations on the Respondent's reply, particularly the issues C, D and E described in ... .

(viii) The conclusion of JAB that 'though the VMS seems to be at variance with staff rule 104.14, the panel had no basis for concluding that the appellant would have been promoted against the contested D-1 post, if staff rule 104.14(f)(iii) had been adhered to.' (...)

(ix) The conclusion of JAB that 'the appellant's right to full and fair consideration for the contested post was honoured'. (...)

(x) The amount of compensation. It should have been higher.

(c) Adequate compensation in lieu of rescission of the decision mentioned in (vi) above.

(d) The amount that would have been added to the Applicant's emoluments and pension from the time the post of Chief, MAS, was filled plus adequate compensation for injustice suffered by the Applicant."

Whereas the Respondent filed his answer on 14 November 1991;

Whereas the Applicant filed written observations on 11 March 1992;

Whereas, on 5 June 1992, the Tribunal asked the Respondent to produce documents requested by the Applicant, and on the same date, the Respondent complied with the Tribunal's request;

Whereas, on 23 June 1992, the Applicant submitted his comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 20 January 1970. He was initially offered a one-year intermediate-term project personnel appointment, under the 200 Series of the Staff Rules, at the L-4 level, as an Expert in Development Administration in the Office of Technical Cooperation at the Institute of Public Administration in Khartoum, Sudan. His appointment was extended for further fixed-term periods until 1 January 1973, when he was transferred to Headquarters as a Consultant at the P-4 level, on a nine-month fixed-term appointment under the 100 Series of the Staff Rules, in the Administrative Management Service of the Office of the Under-Secretary-General for Administration and Management. On 1 December 1973, his functional title was changed to Administrative Management Officer and after serving on further fixed-term appointments, on 14 November 1974, he was offered a probationary appointment and on 1 May 1975, a permanent appointment. On 1 April 1976, the Applicant was promoted to the P-5 level and his functional title was changed to Senior Administrative Management Officer. On 30 April 1991, the Applicant separated from the service of the United Nations.

In 1989, the post of Chief, Management Advisory Service, at the D-1 level, became vacant in the Evaluation and Management Services Division, Office of Programme Planning, Budget and Finance of the Department of Administration and Management. Its vacancy was announced in Vacancy Announcement 89-A-OPB-347-NY. Staff members at the D-1 or P-5 level were invited to apply. The Applicant and sixteen other staff members applied for

the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and administrative instruction ST/AI/338 of the same date (and its addenda).

The system was designed to fill, through redeployment, essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future. These posts would be reviewed by departments and offices to determine which were essential to meet programme mandates. All vacancies to be filled would be advertised and qualified staff members would be invited to apply, including staff serving within the office where the vacancy was located. The candidates would be reviewed and evaluated by a Redeployment Committee, whose functions would initially be entrusted to the Appointment and Promotion Board (APB) at Headquarters for posts in the Professional category and above. The APB would recommend a short-list of staff members found to be the best qualified for each vacancy; and the short-list of candidates would be communicated to the heads of department or office concerned, who would then make the final selection. However, as the 1986 promotion review was under way, vacant posts already identified for staff members recommended for promotion would not be included in the review.

The Applicant's application, and those of sixteen other applicants, were forwarded to the APB. After considering all the applications, the APB submitted to the Office of Human Resources Management (OHRM), a short-list of three candidates which did not include the Applicant. One of the staff members listed in the short-list was Mr. Joseph Klee, whose D-1 post in OHRM had been abolished during the retrenchment exercise and who was encumbering a temporary non-core post. The APB decided that the three names should be transmitted to the Department of Administration and Management for final selection by the head of the Department. Such transmission was effected in a memorandum dated 22 November 1989, from the Assistant Secretary-General, OHRM, to the Acting Under-Secretary-General for Administration and Management.

In a reply dated 15 December 1989, the Acting Under-Secretary-General for Administration and Management informed the Assistant Secretary-General, OHRM, that he had selected Mr. Klee to fill the D-1 post of Chief, Management Advisory Service, which the Applicant had sought.

On 14 March 1990, the Applicant requested the Secretary-General to review the administrative decision not to appoint him to that post. On 18 May 1990, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that the decision not to appoint him as Chief, Management Advisory Service, had been "properly taken in accordance with established procedures" and would not be rescinded.

On 1 June 1990, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 14 February 1991. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 31. Firstly, the Panel concludes that though the VMS seems to be at variance with staff rule 104.4, the Panel had no basis for concluding that the appellant would have been promoted against the contested D-1 post, if staff rule 104.14(f)(iii) had been adhered to.
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> 32. Secondly, the Panel concludes that the appellant's right to full and fair consideration for the contested post was honoured.
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> 33. Thirdly, the Panel concludes that the appellant suffered some moral damage as a result of his application having been considered under procedures which seem to be at variance with established procedure.
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> 34. Accordingly, the Panel recommends that the appellant be awarded the sum of $1.00 as moral compensation.
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> 35. The Panel makes no further recommendation in support of the appeal."

On 5 March 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided to maintain the contested decision and to take no further action on the case. The letter read in part as follows:

> "... The Secretary-General fully agrees with the Board's conclusion that your right to full and fair consideration for the contested post was honoured. He cannot agree, however,

with its conclusion that you suffered moral damages as a result of your application having been considered 'under procedures which seem to be at variance with established procedure', and with its consequential recommendation for award of the sum of $1.00 as moral compensation. The Secretary-General promulgated the vacancy management system in Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 which, while it remains in effect, has suspended the application of the procedure provided for in staff rule 104.14(f)(iii)(a), a promotion review to be conducted normally once a year. The establishment of the vacancy management system constituted a valid exercise of the Secretary-General's authority as Chief Administrative Officer, and there was no ambiguity as to the procedures to be followed in the filling of the contested post which you accepted by availing yourself of the benefits of vacancy management system by applying for the post pursuant to these provisions."

On 4 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to fill the vacant D-1 post following the Vacancy Management and Staff Redeployment system procedure was invalid. If the Applicant's promotion had been considered under staff rule 104.14 only P-5 candidates with 10 years experience would have been considered and the Applicant would have been promoted.

2. The Respondent failed to observe the guidelines of the Vacancy Management and Staff Redeployment system and did not fairly and objectively review the qualifications and experience of the candidates, thus causing the Applicant damage.

3. The Joint Appeals Board in its report did not correctly address the issues raised by the Applicant.

Whereas the Respondent's principal contentions are:

1. Promulgation of a temporary Vacancy Management and Staff Redeployment system by means of a Secretary-General's Bulletin and subsidiary administrative instructions was a valid exercise of the Respondent's discretionary powers.

2. The Applicant's right to full and fair consideration for the vacant D-1 post promotion was observed under the Vacancy Management and Staff Redeployment system.

3. The Applicant applied for promotion under the Vacancy Management and Staff Redeployment system and was thus bound by its procedures which were properly applied.

The Tribunal, having deliberated from 5 June to 2 July 1992, now pronounces the following judgement:

I. In his first plea, the Applicant challenges the validity and applicability of the Vacancy Management and Staff Redeployment system (VMS). The Tribunal has already ruled on this issue in Judgement No. 537, Upadhya (1991) and held that the VMS was lawfully established and applicable to promotions that took place during the period in question. Accordingly, the Applicant's objections to the applicability of the VMS to the promotion process in which he was involved are dismissed.

II. The Applicant also contends that, even under VMS, the selection process was flawed, on the grounds that the criteria used for establishing the short-list from which the candidate was to be finally selected was not the one contemplated in paragraph 10 of ST/AI/338/Add.5, according to which the short-list should include "the best qualified for each vacancy". The Applicant submits that the short-list was drawn "not on the basis of qualifications as required by paragraph 10 of ST/AI/338/Add.5 but ... on the basis of whether the candidates' posts were scheduled to be abolished or not". As a result, according to the Applicant, the short-list included the names of three qualified staff members but not of the three most qualified staff members as required.

III. The Applicant further submits that although paragraph 13 of ST/AI/338/Add.5 provides that "other things being equal, priority should be given to staff members encumbering posts scheduled to be abolished", the Appointment and Promotion Board (APB) gave priority to staff members encumbering posts scheduled to be abolished, overlooking the fact that priority should be granted only if "other things" were equal.

IV. The Tribunal holds that there is no evidence to support the Applicant's claim that the short-list was drawn taking into account only candidates encumbering posts to be abolished. On the contrary, the Tribunal is of the view that the evidence shows that the merits of all the candidates were duly considered, that not all of the candidates short-listed were encumbering posts slated to be abolished, and that the result was a valid exercise of the APB's discretion. According to its jurisprudence, the Tribunal cannot substitute its opinion for that of the review body as far as the comparison of merits is concerned. It can only ascertain whether all the candidates were fairly reviewed. This being the case, the Tribunal finds that the short-list was drawn up in accordance with the guidelines set forth in ST/AI/338.

V. The Applicant also claims that the Administration could have side-stepped the selection process altogether and appointed Mr. Klee, the staff member finally selected for the post, through a lateral transfer since he served in the Department where the vacancy was located. This would have been possible under paragraph 3 of ST/AI/338 or under paragraph 4 of ST/AI/338/Add.3 since, as the Applicant argues in his submission to the JAB: "The former involves simply a reassignment of the candidates without any vacancy notification" and the latter admits lateral transfer "without any review of the qualifications of the candidate by the APB". The Applicant submits that, since the Administration did not choose to follow this procedure but, instead, set in motion the selection process, it should abide by the rules that govern such selection process and duly consider all the candidates that applied for the post, instead of simply transferring laterally the candidate selected.

VI. The Tribunal will not enter into this question, although it points out that paragraph 4 of ST/AI/338/Add.3 enables the Administration to omit review by the APB in the case of a lateral transfer. In the Tribunal's view, no evidence has been produced to demonstrate that the selection process was not properly conducted, or that the candidates were not properly reviewed and their merits not properly considered.

VII. The Tribunal has consistently held that with respect to promotion, staff members' rights are limited to being fairly considered. The final choice lies entirely within the properly exercised discretionary authority of the Respondent. The Tribunal has also consistently held that, apart from cases of prejudice or influence of extraneous factors, it cannot examine or compare the merits of different applicants for a post.

VIII. In the present case, the Tribunal finds that the evidence produced shows that the relevant procedures were duly followed, that the Applicant was fairly considered for promotion and that no prejudice, discrimination or extraneous factor has tainted the outcome of the selection exercise.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Ioan VOICU
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary